

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

OSCAR MERCADO,

Petitioner,

-v-

JOHN LEMPKE, Superintendent,
Five Points Correctional Facility,

Respondent.

Case No. 07-CV-5685 (KMK)

ORDER

KENNETH M. KARAS, District Judge:

On November 7, 2007, Petitioner Oscar Mercado ("Petitioner") filed this case under 28 U.S.C. § 2254, seeking habeas corpus relief from a criminal judgment of the New York courts pursuant to which he is presently incarcerated. On November 20, 2007, Magistrate Judge Mark D. Fox issued an order requiring Respondent John Lempke ("Respondent"), the superintendent of Five Points Correctional Facility, to serve and file an answer and to submit a transcript of the trial record. (Dkt. No. 4.)

Instead, Respondent filed a Motion on February 11, 2008, seeking to dismiss the Petition for failure to commence the proceeding within the one-year period of limitation set forth in 28 U.S.C. § 2244(d)(1). Petitioner's opposition, dated February 22, 2008, claims that the Petition was timely under 28 U.S.C. §§ 2244(d)(1)(C) & (D), among other grounds.

"It is well established that the submissions of a *pro se* litigant must be construed liberally and interpreted 'to raise the strongest arguments that they suggest.'" *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 474 (2d Cir. 2006) (quoting *Pabon v. Wright*, 459 F.3d 241, 248 (2d Cir. 2006)) (emphasis in original). Having reviewed the file in this case, the Court is unable to fulfill this obligation without the benefit of Petitioner's trial record and related background (for example, in evaluating Petitioner's claim of newly-discovered evidence).

Accordingly it is

ORDERED that Respondent's Motion to Dismiss is DENIED WITHOUT
PREJUDICE; and it is further

ORDERED that Respondent shall, by October 8, 2008, file with the Court a transcript of Petitioner's trial and copies of all briefs and decisions on appeal or in connection with proceedings pursuant to New York Criminal Procedure Law Article 440 or any other post-trial motions; and it is further


ORDERED that Respondent may thereupon (but no later than October 15, 2008) renew his Motion to Dismiss, either by writing a one-page letter to the Court requesting renewal of the Motion as briefed on February 11, 2008, or by filing new Motion papers; and it is further

ORDERED that in the event Respondent elects to renew his Motion to Dismiss, Petitioner shall have until November 17, 2008, to file any additional opposition.

The Clerk of Court is respectfully directed to terminate the pending motion on the docket.
(Dkt. No. 8.)

SO ORDERED.

Dated: August 6, 2008
White Plains, New York


KENNETH M. KARAS
UNITED STATES DISTRICT JUDGE